2013 WL 10767955 (Iowa Dist.) (Trial Motion, Memorandum and Affidavit)
District Court of Iowa.
Dubuque County

Cathy SUTTER, Dennis Bell, Nancy Bell Weber, Jane Bell Johnson, and Kenneth Bell, Plaintiffs,

v.

FIDELITY BANK & TRUST and Martin Simon, Executor of the Estate of Judith A. Simon, Defendants.

No. LACV057872.
June 24, 2013.

Memorandum of Authorities in Support of Defendant Fidelity Bank & Trust's Motion for Summary Judgment

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Pursuant to Iowa Rule of Civil Procedure 1.981, Defendant Fidelity Bank & Trust (Fidelity), provides the following Memorandum of Authorities in support of its Motion for Summary Judgment.

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I. Introduction.

This case addresses the scope of a financial institution's liability to third-party beneficiaries of a pay-on-death account. The five plaintiffs in this case are siblings who were once named as beneficiaries on their mother's pay-on-death account. Their mother disinherited the five siblings before her death, naming a sixth sibling as sole beneficiary. The disinherited siblings now seek to unravel their disinheritance, asserting a number of legal theories against the estate of the sixth sibling and Fidelity Bank & Trust, the custodian of the pay-on-death account. For the reasons expressed below, summary judgment is appropriate on all claims asserted against Fidelity.

II. Factual and Procedural Background.

Helen Naber was born on XX/XX/1937 in Key West, Iowa and attended school in Farley, Iowa. She married John Bell on July 17, 1959. Together they had six children, Cathy, Nancy, Dennis, Kenneth, Jane, and Judith. [1] [Petition ¶ 6; T.I. Tr. 6:5-9 (Judith)] [2] . John Bell died on April 13, 1984. Helen married Henry Naber on September 17, 1999 and they lived in Dyersville. Mr. Naber died on July 12, 2005. Helen inherited significant wealth from Mr. Naber on his death.

Helen maintained a long-time banking relationship with Fidelity at its Dyersville location. [T.I. Tr. 38:12-13; 39:2-5 (Wieneke)]. Helen dealt primarily with Julie Wieneke. [T.I. Tr. 39:2-5 (Wieneke)]. Wieneke began working at Fidelity in 1977 and has been the Senior Vice President of Fidelity's Dyersville branch at all relevant times. [T.I. Tr. 37:22; 38:3-5 (Wieneke)]. As Senior Vice President, Wieneke oversees operations and customer relations. [T.I. Tr. 37:22; 38:5 (Wieneke)]. Wieneke began working with Helen in 1995 and dealt with Helen on Helen's accounts and certificates of deposit that Helen maintained at Fidelity. [3] [T.I. Tr. 38:12-13; 39:2-5 (Wieneke)].

Helen's health was fading in September 2010 so she moved to Stonehill, a retirement home in Dubuque. [T.I. Tr. 6:16-25; 7:6-12 (Judith)]. At around the same time, Helen requested her attorney, Todd Locher, to prepare a General Power of Attorney designating her daughter Judith as Helen's attorney-in-fact. [T.I. Tr. 59:17; 60:8; 617-17 (Locher)]. Judith became Helen's Power of Attorney on September 9. At the time, Helen owned and maintained several pay-on-death certificates of deposit (POD CDs) totaling approximately $260,000. [T.I. Tr. 11:4-6 (Judith) (Exhibit 3)]. The POD CDs named all six of Helen's children as beneficiaries on Helen's death. [T.I. Tr. 11:7-9 (Judith)].

On November 10, at Helen's request, Locher prepared and Helen signed a Last Will and Testament and Change of Beneficiary. [T.I. Tr. 61:18; 62:18 (Locher); Ex. 6 (Change of Beneficiary); Ex. 5 (Last Will and Testament)]. [4] The Last Will and Testament provided for $500 cash bequests to the five siblings other than Judith, $500 to each of her eleven grandchildren, and $500 to each of her two great grandchildren. Judith was to receive the remainder. [Ex. 5 (Last Will and Testament)]. The Change of Beneficiary document directed Fidelity to change all certificates of deposit owned by Helen to remove any “Pay on Death” designations. [Ex. 6 (Change of Beneficiary)]. It was Helen's clear intent in signing the documents to make certain the great bulk of her assets went to her “beloved daughter” Judith on Helen's death. [Ex. 5; Ex. 6; T.I. Tr. 66:12; 67:1-25; 68:1-19 (Locher)].

The Change of Beneficiary document signed by Helen on November 10, 2010 was never delivered to Fidelity. [T.I. Tr. 49:5-7 (Wieneke)]. Locher testified that Helen called him sometime between November 10 and November 15 and advised him that, instead of removing all beneficiaries from the POD CDs and leaving Judith primary heir under the will, she wanted to designate Judith as the sole beneficiary on all of her POD CDs. [T.I. Tr. 69:8-22; 70:1-21 (Locher)]. Naming Judith sole beneficiary of the POD CDs was consistent with the November 10 estate plan because, either way, the vast majority of Helen's assets would pass to Judith. [T.I. Tr. 68:20-25; 69:1-22 (Locher)]. Locher told Helen that he had no objection to Helen naming Judith as sole beneficiary. [T.I. Tr. 68:20-25; 69:1-22 (Locher)]. Locher testified that he believed Helen was “clear headed” in the phone conversation. [T.I. Tr. 70:21; 71:1-3 (Locher)]. Locher testified that in all of his dealings with Helen, she was out-going, strong-willed, and forceful in her opinions. [T.I. Tr. 71:4-18 (Locher)].

Sometime between November 10 and 15, Helen called Fidelity and spoke with Wieneke. Helen asked to change her beneficiaries and explained she wanted make Judith the sole beneficiary on her POD CDs and asked what the procedure was to accomplish the changes. [T.I. Tr. 8:14-16 (Judith); 41:20-25; 42:1-4 (Wieneke)]. It was clear to Wieneke that Helen wanted to name Judith as sole beneficiary on all the POD accounts. [T.I. Tr. 46:13-16 (Wieneke)]. Fidelity's procedure for changing POD CDs beneficiaries was as follows:

The Owner(s) of a Time Certificate may change the beneficiary designation at any time. However, if the ownership changes, i.e., joint ownership to individual, then the certificate needs to be redeemed and re-issued. *If the owner(s) wants to add or change beneficiaries, [Fidelity] need[s] the original CD brought to the bank along with [Fidelity's] copy retrieved from the bank vault to make the changes.*

The addition or change should be typed below the owner's name on both the original and bank copy, date the change and initial the change next to the addition or change. [Fidelity] then review[s] the Ownership category, adding Payable on Death if needed. A copy is made for [Fidelity's] bookkeeping department to enter changes on [Fidelity's] computer records. The original CD is returned to the owner, and the bank copy is returned to [Fidelity's] vault files.

[Ex. 4 (Explanation of Procedures) (emphasis added)]. Wieneke advised Helen of the policy and explained it would be necessary to bring the original certificates of deposit to Fidelity. [T.I. Tr. 41:24-25; 42:10-15 (Wieneke)]. Because Helen was unable to make the trip to Dyersville from Dubuque, she asked if would be acceptable to have Judith bring the original certificates to Fidelity. [T.I. Tr. 42:10-15 (Wieneke); Judith Depo. 30:2-14]. Wieneke replied that was acceptable. [T.I. Tr. 42:10-15 (Wieneke)].

Acting at her mother's request, Judith brought Helen's POD CDs to Fidelity on November 15. [T.I. Tr. 46:17-21 (Wieneke); Judith Depo. 30:2-17]. When Judith arrived at Fidelity she met with Wieneke. [T.I. Tr. 42:8-25; 43:1-11; 46:17-25; 47:1-25; 48:1-5 (Wieneke); Judith Depo. 30:15-17]. Wieneke reviewed the certificates and made a telephone call to Helen before making any beneficiary changes. [5] [T.I. Tr. 46:17-25; 47:1-3 (Wieneke)l; Judith Depo. 30:19-25]. The call was made on speakerphone and Judith was present and could hear the conversation. [T.I. Tr. 46:17-25; 47:1-31 (Wieneke); Judith Depo. 30:19-25]. Helen made “perfectly clear” during the conversation that she wanted all of the POD accounts changed so that they would be payable to Judith and Judith alone on Helen's death. [T.I. Tr. 47:3-6 (Wieneke); Judith Depo. 30:19-25]. Wieneke repeated the instructions back to Helen and Helen confirmed that Wieneke had correctly stated the changes to be made. [T.I. Tr. 47:22-24; 48:2-5 (Wieneke); Judith Depo. 31:4-8]. Wieneke asked Helen if she had received any legal or estate advice and Helen confirmed that she had. [T.I. Tr. 55:4-19 (Wieneke)]. The telephone conversation lasted ten minutes. [T.I. Tr. 50:14-18 (Wieneke)]. Locher testified that Helen's actions making Judith sole beneficiary on November 15 were consistent with the estate plan created just five days before. [T.I. Tr. 68:20-25; 69:1-7 (Locher)].

Wieneke proceeded to type the change on the original POD CDs as well as the copies Fidelity maintained in its vault. [Ex. 3 (POD CDs)]. Wieneke then wrote the date of the change (November 15) on the face of the certificates, wrote her initials by the written date, and asked Judith to initial as a witness as well, which Judith did. [Ex. 3 (POD CDs)]. It was Fidelity's policy that any such changes be initialed by all present. Judith's status as Helen's power of attorney was irrelevant to the transaction. [T.I. Tr. 42:23-25; 43:1-8 (Wieneke)]. Judith's initials appear on the face of the changed certificates because she witnessed the change, not because she was Helen's power of attorney. [T.I. Tr. 42:20-25; 43:1-8 (Wieneke)]. Wieneke is certain that Judith did not give a gift to herself. [T.I. Tr. 41:17-22 (Wieneke)].

Helen died in March 2011. [Petition ¶ 14]. Because Judith was sole beneficiary of the POD CDs at the time of Helen's death, Fidelity paid the principal and interest due with respect to each certificate to Judith. [Petition ¶ 16; Answer ¶ 16]. The disinherited siblings then filed this action in January 2013 seeking to unravel their disinheritance. Their Petition asserts several claims against Fidelity and Judith's estate. They allege Fidelity breached its contract with Helen by allowing Helen to change beneficiaries on the POD CDs without written instructions to do so, and by allowing Judith, as Helen's attorney in fact, to engage in self-dealing.

The Petition also asserts claims against Fidelity for common law negligence, failure to supervise, and vicarious liability. Fidelity now moves for summary judgment on each of the claims asserted against it.

III. Standard of Review.

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. *Campbell v. Delbridge,* 670 N.W.2d 108, 110 (Iowa 2003); *see also* Iowa R. Civ. P. 1.981. The court may consider "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits." *Green v. Racing Ass'n of Cent. Iowa,* 713 N.W.2d 234, 238 (Iowa 2006). Witnesses' prior testimony may also be considered in support of a motion for summary judgment as a further affidavit under Iowa Rule of Civil Procedure 1.981. *Peoples Trust & Sav. Bank v. Security Sav. Bank,* 815 N.W.2d 744, 758 (Iowa 2012). The evidence is viewed in the light most favorable to the non-moving party, to wit, the disinherited siblings. *Id.* Motions for summary judgment are examined in light of admissible evidence. Iowa R. Civ. P. 1.981(5); *Pitts v. Farm Bureau Life Ins. Co.,* 818 N.W.2d 91, 106 (Iowa 2012).

IV. Count I: The Plaintiffs' Breach of Contract Claim Fails as a Matter of Law Because Iowa Law, the Contract, and Fidelity Policy Do Not Require Written Instructions to Change POD Beneficiaries, Helen Gave Judith Actual Authority to Perform All Acts in Question, Helen's Actions Amounted to Ratification and Estoppel of the Changes, and Fidelity Had No Notice or Knowledge of Any Breach of Trust Committed by Judith.

"It is plain a deposit in an ordinary bank creates a valid contract between the bank and depositor under which the former agrees to repay the funds subject to the rules and regulations by the bank." *In re Stamets' Estate,* 148 N.W.2d 468, 471, 260 Iowa 93, 98 (1967). The disinherited siblings, as alleged third-party beneficiaries, [6] claim Fidelity breached the contract in two ways, namely, by (1) "allowing a change of beneficiaries without written instructions from Helen Nabor to do so," and (2) "authorizing an attorney-in-fact to gift certificates of deposit to herself in violation of the power of attorney under which she was acting." [Petition ¶ 3]. These claims fail as a matter of law, however, because Iowa law, the contract, and Fidelity policy do not require written instructions in order to change POD beneficiaries, and there is no evidence from which a reasonable juror could conclude Helen's power of attorney engaged in self-dealing.

A. Written Instructions to Change POD Beneficiaries Are Not Required by Iowa Law, the Contract or Fidelity Policy.

Iowa law does not require written instructions to change POD beneficiary designations. POD accounts are nonprobate transfers so compliance with the formalities prescribed in creating and amending a will is unnecessary. *See* Iowa Code § 633.279; *In re Estate of Myers,* 825 N.W.2d 1, 6-7 (Iowa 2012); *see also* Unif. Probate Code § 6-101. Iowa Code section 524.805 authorizes POD accounts, stating:

> 8. A state bank may receive deposits from one or more persons with the provision that upon the death of the depositors the deposit account shall be the property of the person or persons designated by the deceased depositors as shown on the deposit account records of the state bank.

Iowa Code § 524.805(8). Iowa statutes related to POD accounts are silent on whether a change can only be accomplished by written instructions by the depositor. Had the legislature intended to impose such requirements, it easily could have said so. *See Oyens Feed & Supply, Inc. v. Primebank,* 808 N.W.2d 186, 194 (Iowa 2011); *Slager v. HWA Corp.,* 435 N.W.2d 349, 353 (Iowa 1989); *see also* Iowa Code § 633.279 (requiring signatures to execute wills and codicils). *See Union Nat'l Bank of Texas v. Ornelas-Gutierrez,* 772 F. Supp. 962 (S.D. Tex. 1991) (stating the legislature knows how to require a signature and, in the absence of such requirement, courts presume no signature is required for purposes of POD accounts).

Courts in other jurisdictions have even allowed oral changes to POD beneficiary designations despite statutory language requiring the changes to be written and signed. In *West Greeley National Bank v. Wygant,* 650 P.2d 1339 (Colo. Ct. App. 1982), the depositor named his step-daughter as POD beneficiary on a money market certificate. The depositor later married and orally requested the bank to name his wife as POD beneficiary. After the depositor's death, the step-daughter argued her disinheritance was invalid under a statute requiring POD alterations to be made "by written order" and "signed by all parties." *Wygant,* 650 P.2d at 1339-40 (quoting Colo. Rev. Stat. § 15-15-105). The court rejected the step-daughter's argument and held the depositor's intent to change beneficiary was accomplished by the oral request. *Id.* at 1440. "To require a writing and signature for this procedure," the court concluded, "would exalt form over substance." *Id.*

Also, a certificate of deposit payable on death is not a negotiable instrument, which would arguably require an endorsement to change a beneficiary under the Iowa Uniform Commercial Code. The UCC states that a negotiable instrument
means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it:

a. is payable to bearer or to order at the time it is issued or first comes into possession of a holder;

b. is payable on demand or at a definite time; and

c. does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain (i) an undertaking or power to give, maintain, or protect collateral to secure payment, (ii) an authorization or power to the holder to confess judgment or realize on or dispose of collateral, or (iii) a waiver of the benefit of any law intended for the advantage or protection of an obligor.

Iowa Code § 554.3104(1) (emphasis added); *see also* Iowa Code § 554.3108 (defining payable on demand or at definite time).

By definition, a POD account is payable at the time of the grantor's death. *See In re Estate of Myers,* 825 N.W.2d 1, 6 (Iowa 2012). Courts addressing the issue consistently maintain that an account payable upon one's death is not "payable on demand or at a definite time." *See, e.g., In* Rotert Faulkner, 660 S.W.2d 463 (Mo. Ct. App. 1983); *Vesley v. Security First Nat'l Bank,* 381 N.W.2d 593 (Wis. 1985); *In re Estate of Balkus,* 381 N.W.2d 593 (Wis. Ct. App. 1985); 10 C.J.S. *Bills and Notes* § 165 ("An instrument payable at a time determined according to the date of someone's death is not payable at a definite time."); 4 *Hawkland UCC Series* § 3-109:2 (West 2012) ("If the instrument is payable upon an event uncertain as to time of occurrence, it is also not payable at a definite time. It is irrelevant that the event is certain to occur or even that it has already occurred. Instruments which are payable 'at death' ... are not payable at a definite time. In none of these cases can a holder determine when payment is due by reference to the instrument alone"); 5A Lary Lawrence, *Anderson UC.C.* § 3-109:12 (3d ed. 2012) ("A post-obituary instrument, that is, an instrument payable at death or a fixed period after death, is not negotiable under the Code even after death has occurred.... A certificate of deposit that is payable on death to a named person is not negotiable and therefore endorsement of that beneficiary is not required to effect a change of the death beneficiary."); *see also West v. Greeley Nat'l Bank v. Wygant,* 650 P.2d 1339 (Colo. Ct. App. 1982). Because Helen's POD CDs were payable upon her death, they are not negotiable instruments for purposes of the Iowa UCC.

Further, the terms of the POD contract do not require written instructions to change POD beneficiaries. A contract is enforced as written, except in cases of ambiguity. *Am. Soil Processing, Inc. v. Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd.,* 586 N.W.2d 325, 329 (Iowa 1998). The contractual terms regarding changing beneficiary designations unambiguously provides: "The person(s) creating [the POD] account type may: (1) change beneficiaries, (2) change account types, and (3) withdraw all or part of the account funds *at any time.*" [Ex. 3 (POD CDs, p.2) (emphasis added)]. The contract as written does not require Helen to be physically present when beneficiary changes are made, does not require the beneficiaries' permission before a change is made, and does not require written instructions. *See 5A Michie on Banks and Banking* § 40 at 161-62 (1994) ("A bank deposit is subject to any agreement which the depositor and the banker may make as to it ... Thus, the depositor may stipulate as to the manner in which or by whom the money in an account may be drawn out....”). By claiming otherwise, the disinherited siblings are asking the Court to read terms into the contract that are neither required by Iowa law nor were agreed upon by the contracting parties.

Finally, Fidelity's policies regarding POD beneficiary changes also do not require written instructions. Fidelity policy allows changes to be made by telephone so long as the original CDs were brought into the bank. Wieneke, a thirty-three year veteran of Fidelity and Senior Vice President, followed the policies precisely when Helen orally instructed Fidelity to name Judith as sole beneficiary of the POD accounts.

Iowa law does not require written instructions to change POD beneficiaries. Even in jurisdictions with statutes requiring POD beneficiary changes to be made in writing and signed, courts have allowed the changes to be made orally because holding otherwise would elevate form over substance. Further, the contract between Helen and Fidelity and Fidelity's policies do not require written instructions before a change of beneficiary can be made. Under these circumstances, no reasonable juror could conclude Fidelity breached its contract with Helen by allowing a change of beneficiaries without written instructions.

B. There is No Genuine Issue of Material Fact Related to Whether Helen's Power of Attorney Engaged in Self-Dealing Because Judith Had Actual Authority to Perform All Acts in Question, Helen's Actions Amounted to Ratification and Estoppel of the Changes, and Fidelity Had No Notice or Knowledge of Any Breach of Trust Committed by Judith.

The disinherited siblings also allege Fidelity breached the contract by allowing Judith, Helen's Power of Attorney, to give herself a gift in violation of the General Power of Attorney. [Petition ¶ 3]. It is undisputed the General Power of Attorney expressly precluded Judith from engaging in self-dealing. [Ex. 7 (General Power of Attorney)]. But the only evidence of self-dealing produced by the disinherited siblings is that Judith took the original POD CDs to Fidelity to accomplish the beneficiary change. The summary judgment record reveals that *Helen,* not Judith, changed the beneficiary designation and that Judith had actual authority to transport the original POD CDs to Fidelity to effect the change.

1. A party retains the power to disinherit intended beneficiaries until the beneficiaries justifiably rely on their anticipated inheritance. It is worth noting at the outset that Helen retained the power to disinherit the siblings on November 15. The common law related to intended beneficiaries generally allows a party to discharge a duty to an intended beneficiary at any time. Section 311 of the Restatement (Second) of Contracts provides, in relevant part:

(1) Discharge or modification of a duty to an intended beneficiary by conduct of the promise or by a subsequent agreement between promisor and promise is ineffective if a term of the promise creating the duty so provides.

(2) *In the absence of such a term, the promisor and promise retain power to discharge or modify the duty by subsequent agreement.*

Restatement (Second) of Contracts §311(1)-(2) (West, Westlaw 2012) (emphasis added). Iowa adopted section 311 in *Bridgeman v. Curry,* 398 N.W.2d 167, 172 (Iowa 1986).

The comments to section 311 explain parties to an agreement retain control over their contractual relationship, unless the contract requires the beneficiary's consent before a variation can be made. *Id.* § 311, cmt. *f* Otherwise, “perfectly proper readjustments” would be prevented despite the beneficiary's misconduct. *Id.* The power to modify encourages intended beneficiaries to continue to treat the promisee with dignity and respect after the beneficiary designation. Under the Restatement, the power to modify a duty to a beneficiary terminates only when the beneficiary “materially changes his position in justifiable reliance on the promise or brings suit on it or manifests assent to it at the request of the promisor or promisee” before he receives a notification of the modification. Restatement (Second) of Contracts §311(2) (1981); *Bridgeman,* 398 N.W.2d at 172 (promisor may modify obligations to third party beneficiary until beneficiary “has acquired rights in it”). Under these authorities, Helen retained the power to disinherit the siblings on November 15.

2. Helen changed the beneficiary designation and named Judith sole beneficiary. The siblings have not presented any *facts* that contradict the testimony and supporting evidence of Judith, Wieneke, or Locher, stating that Helen made the beneficiary changes. The undisputed facts are that Helen signed a Will and Change of Beneficiary Designation that effectively made Judith sole beneficiary of Helen's estate on November 10, just five days before Helen named Judith sole beneficiary of the POD CDs; Helen called Fidelity and requested to name Judith sole beneficiary of the POD CDs between November 10 and 15; Helen directed Judith to take the POD CDs to Fidelity; on November 15, Fidelity spoke with Helen on the phone before making the beneficiary change; Helen instructed Fidelity to name Judith as sole beneficiary; Fidelity allowed Helen to change the POD beneficiary designation only after confirming Helen's wishes a second time; and the November 15 change was consistent with Helen's estate plan. Because the disinherited siblings have produced no admissible *facts* suggesting otherwise, there is no evidence from which a reasonable juror could conclude Judith engaged in self-dealing.

3. Agency Principles Require Summary Judgment.

a. *Judith had actual authority to take the POD CDs to Fidelity.* The disinherited siblings' breach of contract claim also overlooks the fact that Helen gave Judith actual authority to perform all material actions. Although the General Power of Attorney does not allow self-dealing, it also does not prevent Helen from giving Judith actual authority to carry out tasks that might otherwise be prohibited by the General Power of Attorney, including self-dealing. In this case, the undisputed facts establish Judith had actual authority to perform all the actions that form the basis of the disinherited siblings' breach of contract claim, even if one could construe Judith's actions as "self-dealing."

Courts generally maintain that a party need not know of, or rely upon, a power of attorney if the party can establish the agent had actual authority. *See Alerus Fin., N.A. v. W. State Bank,* 750 N.W.2d 412, 422 (N.D. 2008); *see also Wood v. Crocker First Nat'l Bank,* 291 P. 221, 222-23 (Cal. Ct. App. 1930); *St. Gaudens v. Se. Bank N.A.,* 559 So. 2d 1259, 1260-61 (Fla. Dist. Ct. App. 1990). The comments to the Restatement (Third) of Agency section 2.01 explain a principal's manifestations may modify an agent's prior actual authority, even if the previous actual authority was conferred by a power of attorney. Restatement (Third) of Agency § 2.01, cmt. c. The Restatement provides the following illustration:
P gives A a power of attorney authorizing A to sell a piece of property owned by P. P subsequently says to A, 'Don't sell the property, lease it instead.' After P's statement, A has actual authority only to lease.

Id. If a principal may reduce the agent's actual authority under a power of attorney, it follows that the principal may increase an agent's actual authority. In short, regardless whether the General Power of Attorney gave Judith authority to perform the actions in question, Judith's actions are binding if Helen gave Judith actual authority to perform the actions. *See Alerus Fin.,* 750 N.W.2d at 422; *Gabelmann v. NFO, Inc.,* 571 N.W.2d 476, 481 (Iowa 1997).

An agent has actual authority to act

> when a principal intentionally confers authority on the agent either by writing or through other conduct which, reasonably interpreted, allows the agent to believe that he has the power to act. Actual authority includes both express and implied authority. Express authority is derived from specific instructions by the principal in setting out duties, while implied authority is actual authority circumstantially proved.

Dillon v. City of Davenport, 366 N.W.2d 918, 924 (Iowa 1985). The comments to Restatement (Third) of Agency section 2.01 explain that the focus is on the agent's reasonable understanding at the time the agent acted. Restatement (Third) of Agency § 2.01, cmt. *c.* Under the circumstances of this case, a reasonable juror could only conclude Judith reasonably understood that Helen gave her authority to perform all the actions that form the basis of the disinherited siblings' breach of contract claim. *See Gabelmann,* 571 N.W.2d at 481; *Dillon,* 366 N.W.2d at 924; *Alerus Fin., N.A. v. W. State Bank,* 750 N.W.2d 412, 422 (N.D.

2008); *see also* *Wood v. Crocker First Nat'l Bank,* 291 P. 221, 222-23 (Cal. Ct. App. 1930); *St. Gaudens v. Se. Bank, N.A.,* 559 So. 2d 1259, 1260-61 (Fla. Dist. Ct. App. 1990); Restatement (Third) of Agency § 2.01, cmt. *c.*

b. *Ratification and Estoppel.* Further, a principal can be liable for the actions of its agent acting without actual authority through ratification and estoppel. *See* Restatement (Third) of Agency §§ 2.05, 4.01. Ratification occurs when a person manifests assent "that the act shall affect the person's legal relations," or engages in "conduct that justifies a reasonable assumption that the person so consents. *Id.* § 4.01. The effect of ratification is that it retroactively creates actual authority. *Id.* at § 4.02. Similarly, a person is estopped from denying the existence of an agency relationship when the person induces a third party to detrimentally change a position if "(1) the person intentionally or carelessly caused such belief, or (2) having notice of such belief that it might induce others to change their positions, the person did not take reasonable steps to notify them of the facts." *Id.* at § 2.05. One treatise makes the following observations concerning the relationship between ratification, estoppel, and the liability of financial institutions:

> A bank which knowingly permits an agent to deposit his principal's funds to his own credit and withdraw them by his individual checks for his own uses, is not liable therefore if the principal, with knowledge of his acts, permits, or ratifies them. The rule of law that, where one of two innocent parties must suffer through a wrongful act of a third party the one who has enrolled such third party to accomplish the wrong must bear the loss, is applicable to a case in which the bank or principal must suffer a loss resulting from an unauthorized or wrongful act of the agent. Where the principal by entrusting his money to the agent enables him to do the wrong, the principal rather than the bank should bear the loss.

5A Michie on Banks and Banking § 69c, at 298-99 (1999) (citing *Atlanta & St. A.B. Ry. Co. v. Barnes,* 95 F.2d 273 (5th Cir. 1938); *Okla. State Bank v. Galion Iron Works,* 4 F.2d 337 (8th Cir. 1925); *McStay Supply Co. v. John S. Cook & Co.,* 132 P. 545 (Nev. 1913); *Commercial & Agric. Bank v. Jones,* 18 Tex. 811 (1857)); *see Grabowski v. Bank of Boston,* 997 F. Supp. 111, 126 (D. Mass. 1997) ("A principal with knowledge that an agent is exceeding the bounds of its powers is liable for its transactions with that agent."); *see also Michelin Tires (Canada) Ltd. v. First Nat'l Bank of Boston,* 666 F. 2d 673, 680 (1st Cir. 1981); *First Nat'l Bank v. Cooper,* 312 S.E.2d 607, 608-09 (Ga. 1984); *Dockstader v. Brown,* 204 S.W.2d 352, 358-59 (Tex. Ct. App. 1947).

Helen arranged the change of POD beneficiaries by sending Judith to take the CDs to Fidelity. [T.I. Tr. 42:10-15; 46:17-21 (Wieneke); Judith Depo. 30:2-17]. Helen spoke with Fidelity during the change and had actual knowledge of the change. [T.I. Tr. 47:3-6, 22-24; 48:2-5 (Wieneke); Judith Depo. 31:4-4]. Helen in fact instructed Fidelity to make the beneficiary change and there is no evidence to suggest otherwise. [T.I. Tr. 47:3-6, 22-24; 48:2-5 (Wieneke); Judith Depo. 31:4-4]. Therefore, even if a fact question exists related to Judith's actual authority, which it does not, summary judgment is appropriate because Fidelity cannot be liable as a matter of law under the doctrines of estoppel and ratification. *See* 5A Michie § 69c, at 298-99; *see also Atlanta & St. A.B. Ry. Co.,* 95 F.2d at 273; *Okla. State Bank,* 4 F.2d at 337; *McStay Supply Co,* 132 P. at 545; *Commercial & Agric. Bank,* 18 Tex. at 811.

c. *Fidelity cannot be liable absent notice or actual knowledge of Judith's breach of trust.* Moreover, Fidelity, acting in the normal channels of business, did not have notice or knowledge of any breach of trust by Judith. Ordinarily, a bank has no contractual duty to take actions beyond the normal channels of business in order to determine whether an agent is acting within the scope of its limited power of attorney. *See* 5A *Michie on Banks and Banking* § 72, at 301-02; *see also Crosby v. Loudoun Nat'l Bank,* 235 F.2d 540 (4th Cir. 1956) (stating it would "obviously be impractical" to impose duty on bank to ensure agent did not exceed power of attorney); *Grabowski v. Bank of Boston,* 997 F. Supp. 111, 126-27 (D. Mass. 1997). One treatise explains:

> It is generally held that where an agent draws checks on his principal's account, payable to himself, and deposits them to his own account, the mere form of the transaction, in the absence of additional circumstances, is not sufficient to put depositing bank on notice of the agent's fraud. If knowledge comes to the bank that an agent who is allowed to check upon the funds of a principal on deposit with it is about to commit a breach of trust in drawing checks upon the fund in bank, in such event, it would be the duty of the bank to protect the rights of the principal; but to acquire the knowledge, such bank will not be required

> to assert itself beyond the channels of its business. To hold a bank to a higher duty than that of being bound within the channels of its business in acquiring information of any projected breach of trust by an agent who has the power to check upon the funds of the principal in the bank would imperil the banking interests of the country. Where a principal is the depositor, and occupies a contractual relation to the bank, but an agent is given authority to draw checks against the deposit for the benefit of the principal or his business, the bank is not authorized to pay checks drawn by the agent for his own benefit if it know, or, it is sometimes said, if it have good reason to know, the fact.

5A *Michie on Banks and Banking* § 72, at 301-02. Thus, unless a financial institution has knowledge that a power of attorney is about to commit a breach of its fiduciary duty, the financial institution has no duty to investigate. *See Fidelity & Deposit Co. of Md v. Merchants Nat'l Bank,* 273 N.W. 141, 223 Iowa 446 (1937) (holding bank had no duty to investigate whether agent who had actual and apparent authority was embezzling funds); *Bank IV, Olathe v. Capitol Federal Savings & Loan Ass'n,* 828 P.2d 355 (Kan. 1992) ("The lending institution has the right to assume the attorney in fact is acting lawfully ... and is not liable to the principal for the attorney in fact's subsequent misappropriation of the funds absent some participation therein and knowledge thereof."); *Vinogradova v. Suntrust Bank, Inc.,* 875 A.2d 222 (Md. Ct. App. 2005); *Gupta v. Lincoln Nat'l Life Ins. Co.,* 2005 WL 3304019 (Ohio Ct. App. 2005) (financial institution has no duty to investigate whether power of attorney is engaging in self-dealing).

Even assuming the plaintiffs raised a genuine fact dispute on Judith's actions, there is no evidence to suggest Fidelity had knowledge or notice that Judith was about to breach a duty of trust she owed to Helen. Fidelity's normal channel of business when a customer wishes to change beneficiaries on a POD account is to have the original brought into the bank and, if the customer did not bring in the originals, call the customer on the phone and confirm the customer's wishes. And that's exactly what Wieneke did. If Judith had in fact exceeded her authority as Helen's agent, Fidelity did not have notice or knowledge of it. The position taken by the disinherited siblings is not only "obviously... impractical," *Crosby,* 235 F.2d at 540, but also "imperil[s] the banking interests of the country," 5A *Michie on Banks and Banking* § 72, at 301-02, because it would have financial institutions go beyond the normal channels of business to check upon the scope of an agent's authority in all circumstances. Therefore, because Fidelity, acting in its normal channel of business, had no knowledge or notice of a breach of trust allegedly committed by Judith, the disinherited siblings' breach of contract claim fails as a matter of law.

C. Conclusion. The siblings' mechanical argument that written instructions are required in order to change POD beneficiaries is unsupported by Iowa law, the contract, and Fidelity's policy regarding change of beneficiaries and elevates form over substance. The undisputed facts demonstrate that Helen, not Judith, named Judith as sole beneficiary. Also, regardless of how one characterizes Judith's actions, agency principles require summary judgment because Judith had actual authority to perform the acts in question, Helen ratified Judith's actions, Helen would be estopped from denying Judith's actions, and Fidelity, acting in the normal course of business, did not have notice that Judith breached, or was about to breach, a duty of trust she owed to Helen.

V. Count II: The Disinherited Siblings' Common Law Negligence Claim Fails as a Matter of Law Because A Financial Institution Does Not Owe Third Party Beneficiaries of a Pay-On-Death Certificate of Deposit an Extra-Contractual Duty of Care.

The disinherited siblings assert Fidelity negligently performed the contract between it and Helen. The plaintiffs' petition does not allege they suffered personal or property damage. Instead, Plaintiffs' negligence claim seeks recovery for purely economic loss, namely, losses suffered as a result of Judith's designation as the sole beneficiary of the pay on death account. This case therefore implicates the economic loss rule. [7]

1. *Overview of the Economic Loss Rule.* The economic loss rule generally bars recovery in negligence when the plaintiff suffers only economic loss. *Annett Holdings, Inc. v. Kum & Go, L.C.,* 801 N.W.2d 499, 503 (Iowa 2011). This is because a person who suffers purely economic loss due to another's negligence has suffered no legally cognizable or compensable injury. *Nebraska Innkeepers, Inc. v. Pittsburgh-Des Moines Corp.,* 345 N.W.2d 124, 126 (Iowa 1984). In seminal case, Justice Holmes observed, “no authority need be cited to show that, as a general rule, at least, a tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong.” *Robins Dry Dock & Repair Co. v. Flint,* 275 U.S. 303, 309 (1927). The economic loss rule has been around for over a century and has been described as a “well settled” feature of American law. *Annett Holdings,* 801 N.W.2d at 503; Peter Benson, *The Problem with Pure Economic Loss,* 60 S. C. L. Rev. 823, 823 (2009).

The economic loss rule has been applied in a number of contexts. Iowa courts have applied the economic loss rule where the plaintiff was in a chain of distribution with the defendant, *Annett Holdings, Inc.,* 801 N.W.2d at 506, where a motel suffered economic loss due to defendant's negligent construction of a nearby bridge, *Nebraska Innkeepers,* 345 N.W.2d at 128, and where an employer sued a third-party for injuring two of its workers, *Anderson Plasterers v. Meinecke,* 543 N.W.2d 612, 613-14 (Iowa 1996). *See also Tomka v. Hoechst Celanese Corp.,* 528 N.W.2d 103, 106 (Iowa 1995). These are sometimes referred to as “stranger economic loss” cases and are premised on the idea that “economic reverberations travel quickly and widely, resulting in potentially limitless liability.” *Annett Holdings,* 801 N.W.2d at 504; *see also* Dan B. Dobbs, *An Introduction to Non-Statutory Economic Loss Claims,* 48 Ariz. L. Rev. 713, 723 (2006) (“Stand-alone economic loss often spreads without limit.”).

The economic loss doctrine is at its strongest when the parties have a contractual relationship. In *Annett Holdings* the Iowa Supreme Court recently explained:

> When two parties have a contractual relationship, the economic loss rule prevents one party from bringing a negligence action against the other over the first party's defeated expectations-a subject matter the parties can be presumed to have allocated between themselves in their contract.

Annett Holdings, 801 N.W.2d at 503-04; *see also* Restatement (Third) of Torts: Liab. For Econ. Harm § 1, cmt. c (T.D. No. 1, 2012) (“Risks of economic loss tend to be especially well suited to allocation by contract.”). This rule-known as the “contractual economic loss rule”- is designed to prevent the “tortification of contract law” and is premised on the notion “that parties to a contract have allocated the economic risks of nonperformance through the bargaining process.” *Indem. Ins. Co. of N. Am. v. Am. Aviation, Inc.,* 891 So. 2d 532, 536 (Fla. 2004); *see Annett Holdings,* 801 N.W.2d at 404 (“Courts reason that when a party enters into a contract, that document should control the party's rights and duties.”); *see also East River S.S. Corp. v. Transamerica Delaval, Inc.,* 476 U.S. 858, 866 (1986) (stating economic loss rule prevents contract law from drowning in a sea of tort) (citing Grant Gilmore, *The Death of Contract* (2d ed. 1995)).

2. The economic loss rule bars the disinherited siblings' common law negligence claim. The contractual economic loss rule applies where, as here, third-party beneficiaries of a contract attempt to circumvent the contract by alleging negligence. *See, e.g., Intercoastal Realty, Inc. v. Tracy,* 706 F. Supp. 2d 1325, 1332-33 (S.D. Fla. 2010); *Town of Alma v. Azco Const., Inc.,* 10 P.3d 1256, 1264 n.12 (Colo. 2000); *see also Danforth v. Acorn Structures, Inc.,* 608 A.2d 1194, 1200 (Del. 1992). In these cases, the third-party beneficiary has a remedy in the event the contract is breached. *See* Vincent R. Johnson, *The Boundary-Line Function of the Economic Loss Rule,* 66 Wash. & Lee L. Rev. 523, 555 (2009); *see* Restatement (Third) of Torts: Liab. For Econ. Harm § 1, cmt. c (T.D. No. 1, 2012). The remedy is the product of a bargained-for allocation of economic risks between the parties to the contract. *See Indem. Ins. Co. of N. Am.,* 891 So. 2d at 536; *Jardel Enters., Inc. v. Trinconsultants, Inc.,* 770 P.2d 1301, 1304 (Colo. Ct. App. 1988) (“This economic loss rule applies whether the plaintiff is a party to the contract or a third-party beneficiary since the duty the contract promisor owed and breached was determined by the manifested intentions of the parties to the contract and is entirely contractual.” (citing W. Prosser & W. Keeton, *Torts* § 92 (5th ed. 1984)); Restatement (Third) of Torts: Liab. For Econ. Harm § 1, cmt. c (T.D. No. 1, 2012) (discussing potential plaintiff's opportunity to allocate risk through contract). Iowa courts consistently apply the economic loss doctrine where a negligence claim is an attempt to bypass a contract. *See, e.g., Annett Holdings,* 801 N.W.2d at 503-04; *Determan v. Johnson,* 613 N.W.2d 259, 262-63 (Iowa

2000); *Preferred Marketing Assoc's. Co. v. Hawkeye Nat'l Life Ins. Co.,* 452 N.W.2d 389, 397 (Iowa 1990); *Nelson v. Todd's Ltd.,* 426 N.W.2d 120, 125 (Iowa 1988); *Richards v. Midland Brick Sales Co.,* 551 N.w.2d 649, 650-52 (Iowa Ct. App. 1996).

Further, application of the economic loss doctrine is appropriate when the negligence claim is remote. *See Annett Holdings,* 801 N.W.2d at 504. The negligence theory asserts that Fidelity failed to perform the agreement with Helen, which in turn resulted in economic loss to the disinherited siblings. Iowa courts have historically precluded parties with such remote claims from asserting negligence claims. *See id; State ex rel. Miller v. Philip Morris Inc.,* 577 N.W.2d 401, 406-07 (Iowa 1998); *Anderson v. Plasterers v. Meinecke,* 543 N.W.2d 612, 613 (Iowa 1996); *Tomka v. Hoeschst Celanese Corp.,* 528 N.W.2d 103, 107 (Iowa 1995); *Neb. Innkeepers, Inc. v. Pittsburgh-Des Moines Corp.,* 345 N.W.2d 124, 127-30 (Iowa 1984).

Additionally, the traditional factors used in determining the applicability of the economic loss doctrine, if applicable, favor applying the doctrine. In *Determan v. Johnson,* 613 N.W.2d 259, 263 (Iowa 2000), the Iowa Supreme Court explained the court focuses on “the nature of the defect, the type of risk ... the manner in which the injury arose, [and] the type of damages that the plaintiff seeks to recover.” In this case Fidelity's actions presented no risk of harm, there was no “defect,” and the disinherited siblings seek purely contractual damages. The damages claimed by the siblings for negligence claim are in fact *identical* to the damages claimed in the breach of contract claim. All of these factors favor applying the economic loss doctrine to the disinherited siblings' negligence claim.

The Iowa Supreme Court has applied the economic loss doctrine in related contexts. In *Carr v. Bankers Trust Co.,* 546 N.W.2d 901 (Iowa 1996), the Court considered the doctrine in an action for negligence against a bank as custodian of a trust. In that case, the trustees sued the bank for negligence after discovering an investment advisor to the trust misappropriated over $65 million in trust assets. *Carr,* 546 N.W.2d at 902-903. The court, applying a foreseeability test, held the economic loss doctrine barred the claim because the Bank could not have reasonably known the trustees were relying on the Bank's custodial services. *Id.* The court concluded the Bank could not be liable in negligence for failing to prevent the misappropriation by the trust advisor.

The *Carr* court's reasoning applies with similar force in this case. A pay-on-death account is a bank account “whose owner instructs the bank to distribute the account's balance to a beneficiary upon the owner's death.” Black's Law Dictionary 21 (9th ed. 2009). As with a revocable trust, designated beneficiaries of a POD account have a contingent interest in the account assets. *See In re Estate ofMyers,* 825 N.W.2d 1, 6-7 (Iowa 2012) (stating assets in a POD account “are the personal property of the grantor *before* death [and] become the personal property of the designated beneficiaries upon the grantor's death pursuant to a contract between the grantor and the administrator of the account.”). The contract allowed Helen to change beneficiaries and withdraw or transfer the account balance “at any time.” [Ex. 3 (POD CDs, p. 2)]. Beneficiaries could not withdraw until Helen died and only if the beneficiary was then living. [Ex. 3 (POD CDs, p. 2)]. Fidelity made no representations related to the “appropriateness or effect of the ownership and beneficiary designation” and stated Helen could change beneficiaries at any time. [Ex. 3, (POD CDs, p. 2)]. The contract also expressly stated Fidelity undertook “no obligation to monitor the transactions to determine that they are on the owner's behalf.” [Ex. 3 (POD CDs, p. 2]. Under these circumstances, as in *Carr,* Fidelity, as mere custodian of the POD account, could not reasonably know or have foreseen that the beneficiaries' would have relied on a contingent interest that could be jettisoned at any time. *Carr,* 546 N.W.2d at 907; *see McAuley v. Southington Sav. Bank,* 796 A.2d 1250 (Conn. App. 2002) (bank had no duty to beneficiary of CD); *but see Taylor v. First Nat'l bank,* 508 N.E.2d 1006 (Ohio Ct. App. 1986).

Further, the special relationship exception to the economic loss rule does not apply. Unlike professionals who perform services-such as physicians, attorneys, and engineers-financial institutions and their customers have no special relationship. *See Eliopulos v. Knox,* 848 P.2d 984 (Idaho Ct. App. 1992) (bank has no special relationship with customers under economic loss rule); *White v. AAMG Constr. Lendign Ctr.,* 700 S.E.2d 791 (W. Va. 2010) (bank has no special relationship with lender absent showing of ongoing supervisory relationship); *see also Sterling Sav. Bank v. Murphy,* 166 Wash. App. 1006 (Wash. Ct. App. 2012) (unpublished). In this case, Fidelity had no duty to oversee or supervise the POD CDs and there was nothing in the contract that otherwise created a special relationship between Fidelity and Helen beyond the normal bank/customer relationship. *See White v. AAMG Const. Lending Ctr.,* 700 S.E.2d 791 (W. Va. 2010); *Santucci v. Citizens Bank of R.I.,* 799 A.2d 254 (R.I. 2002) (holding bank does not owe a duty of care to an **elderly** depositor to investigate suspected financial exploitation).

Moreover, application of the economic loss rule under these circumstances advances the objectives of the Uniform Commercial Code. In *Annett Holdings,* the court discussed two cases in which banks were held liable for conversion under Article 3 for cashing checks based on forged or unauthorized endorsements. 801 N.W.2d at 506 (citing *Waukon Auto Supply v. Farmers & Merchants Savings Bank,* 440 N.W.2d 844 (Iowa 1989); *Phariss v. Eddy,* 478 N.W.2d 848 (Iowa Ct. App. 1991)). The Court distinguished between conversion and negligence claims and explained,

> Those decisions [permitting conversion actions] provide another justification for the application of the economic loss doctrine rule here. If parties could simply bring negligence claims whenever financial transactions went awry, there would be little need for the elaborate payment system rules set forth in Articles 3 and 4 of the U.C.C.

Id.

3. Conclusion. The economic loss rule generally bars negligence claims when the plaintiff suffers purely economic damages. The economic loss rule precludes the disinherited siblings' common law negligence claim because the rationale for applying the rule where parties have a contractual relationship applies with similar force under these circumstances, the disinherited siblings' claim is remote, the traditional factors militate against allowing the claim, the Iowa Supreme Court has applied the rule in similar contexts, a bank and its customers have no “special relationship” for purposes of the qualifications to the rule, and application of the rule in this context would advance the objectives of the UCC. Because the economic loss rule applies, there is no genuine issue of material fact on the disinherited siblings' common law negligence claim.

VII. Count III: Vicarious Liability and Negligent Supervision.

A. Vicarious Liability. To recover on a claim of vicarious liability under the theory of respondeat superior, Plaintiffs must satisfy present proof of an employer/employee relationship, and proof that the injured occurred within the scope of employment. *Biddle v. Sartori Mem. Hosp.,* 518 N.W.2d 795, 797 (Iowa 1994). Of course, the Plaintiffs must also prove the underlying alleged wrongdoing of the employee. Count III of the petition vaguely alleges Fidelity should be vicariously liable for Wieneke's “wrongful acts.” But the petition does not state with any degree of specificity the nature of the wrongful acts. Presumably, the “wrongful acts” are those of negligence or breach of contract, namely, Wieneke's actions in allowing Judith to change the beneficiaries on the POD account. As discussed above, however, the disinherited siblings' common law negligence claim and breach of contract claims fail as a matter of law.

B. Negligent Supervision. Fidelity denies any “wrongful acts” on the part of Wieneke and admits that in the event of any “wrongful acts” by Wieneke with respect to the issues in this action, Fidelity, as Wieneke's employer, would be liable for such acts. No claim is made by Fidelity that Wieneke was acting outside the scope of her employment with respect to the matters and actions at issue in this action.

While no Iowa case was located addressing whether a negligent supervision claim can be submitted in the same case where the employer has admitted vicarious liability, the majority of courts dealing with this issue have ruled that the negligent supervision claim is barred in this situation. The independent claim against the employer (whether negligent hiring, supervision or entrustment) is unnecessary once vicarious liability is admitted and allowing evidence concerning the claim confuses the issues and risks error.

“The majority view is that once an employer has admitted *respondeat superior* liability for a driver's negligence, it is improper to allow a plaintiff to proceed against the employer on any other theory of imputed liability.” *McHaffie v. Bunch,* 891 S.W.2d 822, 826 (Mo. 1995) (citing cases). The *McHaffie* court explained that negligent entrustment, like *respondeat superior,* required “some level of culpability by the employee in causing injury to a third party” in order for the employer to face liability. *Id.* at

825. Iowa law is the same. *See IMT Insurance Co. v. Crestmoor Golf Club,* 702 N.W.2d 492, 496 (Iowa 2005) ("A necessary element of a claim for negligent supervision or retention is an underlying tort or wrongful act committed by the employee."); *Kiesau v. Bantz,* 686 N.W.2d 164, 172 (Iowa 2004) (for negligent hiring, supervision, or retention claim, plaintiffs must prove underlying wrongful act by employee, "In other words, the injured party must prove a case within a case."); Iowa Uniform Instruction No. 730.5 (element of negligent supervision includes that employee incompetence was cause of damages).

The *McHaffie* Court summarized the rationale for the majority view that disallows a negligent entrustment claim when vicarious liability has been admitted:

> ... If all of the theories for attaching liability to one person for the negligence of another were recognized and all pleaded in one case where the imputation of negligence is admitted, the evidence laboriously submitted to establish other theories serves no real purpose. The energy and time of courts and litigants is unnecessarily expended. In addition, potentially inflammatory evidence comes into the record which is irrelevant to any contested issue in the case .... Once vicarious liability for negligence is admitted under *respondeat superior,* the person to whom negligence is imputed becomes strictly liable to the third party for damages attributable to the conduct of the person from whom negligence is imputed. The liability of the employer is fixed by the amount of liability of the employee... this is true regardless of the "percentage of fault' as between the party whose negligence directly caused the injury and the one whose liability for negligence is derivative.

891 S.W.2d at 826 (citations omitted); *see also Diaz v. Carcamo,* 253 P.3d 535, 540 (Cal. 2011) (explaining that the employer's admission of vicarious liability "remove[s] the legal issue of her liability ... from the case leaving no material issue ... to which the offered evidence [of negligent entrustment] could be directed.") (internal citations and quotations omitted); Richard Mincer, *The Viability of Direct Negligence Claims Against Motor Carriers in the Face of an Admission of Respondeat Superior,* 10 Wyo. L.Rev. 229, 234-35 (2010) (hereinafter "Mincer"). [8]

In *Diaz,* the Court addressed whether the adoption of California's comparative fault scheme changed the prior law. The court held that it did not and a negligent entrustment claim was still barred:

> If, as here, an employer offers to admit vicarious liability for its employee's negligent driving, then claims against the employer based on theories of negligent entrustment, hiring, or retention become superfluous. To allow such claims in that situation would subject the employer to a share of fault *in addition to* the share of fault assigned to the employee, for which the employer has already accepted liability. To assign to the employer a share of fault greater than that assigned to the employee whose negligent driving was a cause of the accident would be an inequitable apportionment of loss.

253 P.3d at 543-44 (emphasis in original); *see also Campa v. Gordon,* 2002 U.S. Dist. LEXIS 15032 *3-4 (N.D. Ill. 2002) ("The fault of the employer for negligent entrustment, in a comparative negligence jurisdiction, is still derived from the negligence of the employee, therefore, additional liability cannot be imposed on the employer where the employer has already admitted it is liable for 100% of the fault attributable to the negligent employee.").

In *Gant v. L. U. Transp.,* 770 N.E.2d 1155, 1160 (Ill. App. Ct. 1st Dist. 2002), the Court explained it this way:

> The doctrine of *respondeat superior* and the doctrine of negligent entrustment [9] are simply alternative theories by which to impute an employee's negligence to an employer. Under either theory, the liability of the principal is dependent on the negligence of the agent. If it is not disputed that the employee's negligence is to be imputed to the employer, there is no need to prove that the employer is liable. Once the principal has admitted its liability under a *respondeat superior* theory, such as in the instant case, the cause of action for negligent entrustment is duplicative and unnecessary. To allow both causes of action to stand would

allow a jury to assess or apportion a principal's liability twice. The fault of one party cannot be assessed twice, regardless of the adoption of comparative negligence.

In addition to the fact that the negligent supervision evidence is not relevant once vicarious liability is admitted, if introduced it can taint the trial with prejudicial evidence. In *Diaz,* the Court held the lower court's err in allowing evidence of the negligent entrustment claim was prejudicial and required a new trial. 253 P.3d at 545. The negligent entrustment evidence in *Diaz* included among other things the employee's poor employment record, the employer's hiring practices, and the employee's past accidents. *Id.* at 544; *see also* Mincer at 234 (explaining that "[d]irect negligence claims against the employer provide a plaintiff with a backdoor means to introduce evidence, such as driving records and prior bad acts, which are otherwise inadmissible. Moreover, such claims promote confusion of the issues, and provide an avenue to encourage the jury to act based on passion and prejudice, rather than material facts."). Therefore, because Fidelity admits vicarious liability for Wieneke's wrongful acts, the disinherited siblings' negligent supervision claim is improper if the vicarious liability claim is not barred.

Further, to prevail on their negligent supervision claim, the disinherited siblings must show the employer "knew, or in the exercise of ordinary care should have known, of its employee's unfitness at the time the employee engaged in wrongful or tortious conduct." *See Estate of Harris,* 679 N.W.2d at 680. In the first case recognizing the tort of negligent supervision, the Iowa Supreme Court held summary judgment is appropriate when (1) an employer has no actual notice of employee's wrongful conduct, (2) the record is devoid of evidence suggesting the employer "should have known" of the employee's alleged wrongful conduct, and (3) the record was devoid of evidence suggesting the employer should have suspected the employee's wrongful conduct. *Godar v. Edwards,* 588 N.W.2d 701 (Iowa 1999). The summary judgment record demonstrates this case involves an isolated instance in which it is alleged Fidelity's employee engaged in a single instance of wrongful conduct, namely, allowing Judith to engage in self-dealing. Absent specific evidence demonstrating Fidelity knew or should have known Wieneke was unfit, the disinherited siblings may not recover. Summary judgment is therefore appropriate on the negligent supervision claim.

VII. Conclusion.

The disinherited siblings' efforts to undo Helen's disinheritance must fail. Iowa law, the contract, and Fidelity's policies do not require written instructions before one may change POD beneficiaries and there is no genuine issue of material fact related to whether Judith engaged in self-dealing. Also, allowing the negligence claim to go forward threatens a tortification of contract law and, if the claim does go forward, summary judgment is nevertheless appropriate because the undisputed evidence shows Fidelity satisfied whatever duty it owed. Finally, summary judgment is necessary with respect to the negligent supervision and vicarious liability claims because there is no evidence from which a reasonable juror could conclude all elements of the torts have been satisfied.

<<signature>>

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Footnotes

1 Judith has since passed away. [Petition ¶ 5]. The disinherited siblings name Judith's estate as a co-defendant. [Petition].

2 A hearing was held in April 2011 on the plaintiffs' motion for temporary injunction, which was denied. The transcript of the hearing is attached as Exhibit 1. Citations to the temporary injunction transcript are cited as "T.I. Tr."

3 Wieneke, in her dealings on behalf of Fidelity with Helen, noted that Helen was very outgoing, and very knowledgeable concerning interest rates paid on deposits. [T.I. Tr. 46:3-6 (Wieneke)]. She "shopped" around for the best rates available and, if better than being offered by Fidelity, ask Fidelity to meet the higher rates, which Fidelity did. [T.I. Tr. 48:15-21 (Wieneke)]. Helen was accurate with her bookkeeping, knew when interest payments were due her and the applicable interest rates. [T.I. Tr. 46:3-6 (Wieneke)].

4 Locher believed Helen was competent and not acting under the influence of anybody else when she signed the documents, [T.I. Tr. 62:19-25; 63:1-25; 64:1-10 (Locher)].

5 Wieneke testified she knew Helen's voice and knew that she was talking to Helen during the two November 2010 telephone conversations. [T.I. Tr. 45:20-23; 47:13-17 (Wieneke)]. Wieneke believed Helen to be competent when they talked by telephone on November 15 and Helen provided instructions about the changes to be made. [T.I. Tr 44:24-25; 45:1-2; 46:7-12; 47:18-24 (Wieneke)].

6 A third-party beneficiary to a contract may enforce the contract. *See Khabbaz v. Swarz*, 319 N.W.2d 279, 285 (Iowa 1982); *see also* 2 S. Williston, *A Treatise on the Law of Contracts* § 356, at 836 (Jaeger ed. 1959) (observing "the authorities are in accord that one

suing as a third party beneficiary has the burden of showing that the provision was for his direct benefit and unless he can sustain this burden, he will not be permitted to sue on the agreement."). A promisor may typically assert any defense against the third-party beneficiary that the promisor could assert against the promise, including ratification and estoppel. *See Compiano v. Hawkeye Bank & Trust of Des Moines,* 588 N.W.2d 462, 464 n.2 (Iowa 1999) (stating "rights of third-party beneficiary are subject to any defenses of the promisor against the promisee" (quoting 3 E. Allan Farnsworth, *Farnsworth on Contracts* § 10.9, at 51 (2d ed. 1998); *see also* J. Calamari & J. Perillo, *Contracts* § 17-10, at 711 (3d ed. 1987); 17B C.J.S. *Contracts* § 864 (West, Westlaw 2013).

7 The Court in *Annett Holdings* observed in a footnote that the assertion of an "independent duty" is identical to the question whether the economic loss doctrine applies. *Annett Holdings,* 801 N.W.2d at 503 n.1. The duty alleged by the siblings, namely, accurate designation of beneficiaries, is purely contractual. A breach of contract claim arises in the event Fidelity fails to name the proper beneficiaries or otherwise fails to abide by the terms of the contract. Any doubt as to whether the claim is contractual in nature is resolved by examining the siblings requested relief. The siblings seek damages for the proceeds of the CDs, which is the exact same measure of damages for their breach of contract claim. To allow the siblings' negligence claim to proceed would eliminate the line between contract and negligence.

In any event, even if Fidelity owed an independent, extra-contractual duty to the siblings, Fidelity did not breach its duty as a matter of law. *See Vinogradova v. Suntrust Bank, Inc., 875* A.2d 222 (Md. Ct. App. 2005) (bank had no duty to inform principal of account changes when bank was acting under direction of valid power of attorney); *Bank IV v. Capital Fed. Sav. & Loan Ass'n, 828* P.2d 355 (Kan. 1992) ("The lending institution has the right to assume the attorney in fact is acting lawfully). Fidelity complied with all laws and regulations concerning change of beneficiaries of POD accounts. *See Corning Bank v. Rice,* 645 S.W.2d 675, 677 (Ark. 1983) (stating statute created bank's duty). Fidelity also complied with all contractual terms, express or implied, and strictly followed its policies related to changing POD CD beneficiaries. Further, as discussed above, a financial institution will not be held liable for the actions of a third party unless the bank had notice or knowledge of wrongdoing. *See 1C Michie on Bank and Banking* § 39, at 72 (1999) ("It is not the function of the courts to manage a banking corporation or substitute their judgment for that of its officers. Only when the officers are guilty of willful **abuse** of their discretionary power or of bad faith, neglect of duty, or where fraud or breach of trust is involved will the courts interfere."). There is no evidence of bad faith, fraud, breach of trust, or willful **abuse** of discretion.

There is also no question concerning whether Fidelity complied with the wishes of its customer, Helen. *See Tucker Fed. Sav. & Ass'n v. Rawlings,* 434 S.E.2d 94 (Ga. Ct. App. 1993) (duty of care in handling certificates of deposit is to ensure customers wishes are effected); *cf Schreiner v. Scoville, 410* N.W.2d 679, 683 (Iowa 1987) (attorney's duty to third-party beneficiaries of testamentary documents limited to carrying out testator's intent). In this case, Helen's intent was to name Judith as sole beneficiary of the CD accounts. The undisputed evidence shows Helen called Fidelity and requested the change and Fidelity spoke with Helen during the change. Also, Helen named Judith as sole beneficiary of her will just five days before naming Judith as sole beneficiary of the POD CDs. Fidelity's duty, if any, was to carry out Helen's wishes and that is exactly what it did. Therefore, summary judgment is appropriate with respect to the disinherited siblings negligence claim even if the law imposes an extra-contractual duty.

8 *Mincer* explains that negligent entrustment claims "were originally intended to provide a potential means of recovery in situations where vicarious liability is otherwise unavailable"--such as when the employee's acts are outside the scope of employment. Mincer at 232-33. "It seems apparent, then, that these theories are superfluous when the master has already admitted responsibility for any judgment entered against the servant." *Id.* at 233.

9 In *Diaz,* the court explained there was no difference in this analysis whether the claim at issue was negligent entrustment or negligent hiring. See 253 P3d at 542 (two claims are functionally identical).

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